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#### Recommended Citation

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The Disciplinary Arm of the State:  
Foucault on Police Overreach, Militarization, and Mass Surveillance

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Senior Research Paper

There has been much recent discussion devoted to police misconduct in the United States, with particular focus on police brutality, which has certainly been merited. Often enough, there is a shift to discussion of what the police *ought to be*, or what individuals or groups had once thought to be the function of law enforcement, but there are some important considerations many neglect to make about the genesis and evolution of police theory, as well as its practical applications and institutional *raison d'être*. One may be able to better comprehend the functions and motives of police by examining their societal impact through a Foucauldian lens. Michel Foucault provides an insightful and easily applicable framework for understanding relations of power and their pervasiveness, as well as the techniques and applications of discipline as it benefits the state or other ruling power. His understanding of the nature of government and its subservient institutions are easily transposed on that of law enforcement, and it serves to make the “hows” and “whys” of some forms of police misconduct and overreach more clear. From this perspective, it becomes easier to understand not only the actions or motives of state and local law enforcement, but also the decisions they and other powerful institutions make regarding individual rights.

Of course, some historical background must be known before one can begin to make judgments about the overall trajectory of policing, and so this work begins with a brief foray into police theory history and the significant alterations from iteration to iteration. With that groundwork established, the focus will turn to an explanation of the theoretical aspects of Foucault's work, with particular emphasis placed on the aspects of his theory of power. Following this is an application of Foucauldian theory to present day police tactics, as well as to the inter-agency and -institution collaboration and reciprocity one often notices involving the police. This section will deal in detail with not only the strategies used by the police to accrue

power, but also the forms and applications of their power over communities and in relation to other institutions. Using Foucault's perspective on power and opinions on effective methods of enacting social change, this work will conclude with some suggestions for putting this knowledge to use.

### **I. Development of Police Theories**

As one might expect to happen over the centuries, our understanding of what policing is today hardly resembles its original conceptualization. This apparatus of state control and self-regulation—the latter of which will be discussed in more detail later—first started to become an entity separate from the military in the sixteenth century, though both the theory and practice of the police has not ceased to grow and morph. From its initial conception to its current iteration, the concept of policing has inarguably shifted away from some of its original aims and intended services. The ways in which policing changed to fit the needs of the state provide important context as to how some police forces developed to look quite different from others, as well as to highlight their few but incredibly significant similarities in function. Policing has always been a form of social regulation, though its form and function has changed with the methods of control made available to it as techniques of government and technological advances have occurred.

#### *i. 16th-17th Century European Police Theory*

The word “police” in the sixteenth century was not, in fact, assigned to a state-authorized force. Instead, the word had one of three meanings: “[a] form of community or association governed by a public authority, a sort of human society when something like political power or public authority is exercised over it,” “precisely the set of actions that direct these communities under public authority,” or “the positive and valued result of good government.”<sup>1</sup> At this time,

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<sup>1</sup> Foucault, *Security, Territory, Population: Lectures at the Collège De France, 1977-1978*, 312, 313.

“police” could refer to the entity concerning itself with the management of a community, or to a conceptual schema for community management. The referent of the first definition could be as simple as “society,” though not reduced to any lesser level than that, for “[a] family, or a convent won't be said to be a police, precisely because they lack the characteristic exercise of a public authority over them,”<sup>2</sup> while the latter two definitions relate to good conduct or outcome in communal management. Under the feudal model, communities were beholden to the king, but lacked a system of law enforcement anything like those we see today. As it is in modernity, each European state’s power was typically vested in two main branches: the inter-state force—the diplomatic core and the army—and the intra-state force—police, or the bodies of internal societal regulation that were considered such at that time.<sup>3</sup> Long before the 17th and 18th century boom in urbanization, forms of regulation within each major hub of trade and commerce already existed, and these, plus the occasional duties of the king’s men—for one, the *maréchaussée*, in the case of the French—were more or less lifted from these previous roles by reformers and combined into a new idea of “police.”<sup>4</sup> Foucault notes the development of police was, at least in some part, informed by this urbanization, as there was a belief amongst intellectuals at this time, e.g. Domat, that “the link between police and town is so strong that [...] it is only because there is police [...] regulating this cohabitation, circulation, and exchange that towns were able to exist.”<sup>5</sup>

The concept of “police” begins to morph into something else by the seventeenth century—it “begins to refer to the set of means by which the state's forces can be increased while preserving the state in good order. In other words, police will be the calculation and technique

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<sup>2</sup> Foucault, 313.

<sup>3</sup> Foucault, 312.

<sup>4</sup> Foucault, 335-336.

<sup>5</sup> Foucault, 336.

that will make it possible to establish a mobile, yet stable and controllable relationship between the state's internal order and the development of its forces.”<sup>6</sup> The two main goals of such a force were set forth as being “splendor,” which concerns both the aesthetic appeal and strength of the state, and “foster[ing] working and trading relations between men, as well as aid and mutual help.”<sup>7</sup> It is important to note here is that there are aspects of this idea of “police” that are designed to promote civil wellbeing outside of repression of crime. Exemplifying this is a work written by French scholar Turquet de Mayerne, *La Monarchie aristodemocratique*; in it, he outlines a “utopia of a police state,” wherein police “is directed towards men's activity, but insofar as this activity has a relationship to the state,” and “[w]hat is characteristic of [this model of a] police state is its interest in what men do; it is interested in their activity, their ‘occupation’.” The objective of police is therefore control of and responsibility for men's activity insofar as this activity constitutes a differential element in the development of the state's forces.”<sup>8</sup> This system placed the police in charge of knowledge and care of the population, specifically charging them with providing necessities, work, and reinforcing public wellness and safety, as well as creating and maintaining routes of trade.<sup>9</sup> Their ultimate goal is to “[link] together the state's strength and individual felicity. This felicity, as the individual's better than just living, must in some way be drawn on and constituted into state utility: making men's happiness the state's utility, making men's happiness the very strength of the state”—and the police are to accomplish this aim through “disciplining” the populace, exerting their regulatory power over them.<sup>10</sup> There also emerges a new focus on and importance assigned to statistics, as a means both of keeping track of the state’s resources but also foreign states’ resources, which “can be established precisely by

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<sup>6</sup> Foucault, 313.

<sup>7</sup> Foucault, *Essential Works of Foucault, 1954-1984: Power*, 319.

<sup>8</sup> Foucault, *Security, Territory, Population: Lectures at the Collège De France, 1977-1978*, 322.

<sup>9</sup> Foucault, 323-326.

<sup>10</sup> Foucault, 327-328.

police, for police itself, as the art of developing forces, presupposes that each state exactly identifies its possibilities, its virtualities. Police makes statistics necessary, but police also makes statistics possible. For it is precisely the whole set of procedures set up to increase, combine, and develop forces, it is this whole administrative assemblage that makes it possible to identify what each state's forces comprise and their possibilities of development. [...] Statistics is the state's knowledge of the state, understood as the state's knowledge both of itself and also of other states.”<sup>11</sup> This marks a shift in the state’s methods for keeping power over its people, as it became aware of the viability and benefits of this relatively “new” technology.

Foucault acknowledges that every European state, because of differences in language, culture, and history, approached the idea of police differently. Although the differences between the various theories of police are noticeable, one French scholar, Delamare, created a police theory that more or less synthesized the French and German models.<sup>12</sup> Delamare charges the police with thirteen unique responsibilities: “religion, morals, health and subsistence, public peace, the care of buildings, squares, and highways, the sciences and the liberal arts, commerce, manufacture and the mechanical arts, servants and laborers, the theater and games, and finally the care and discipline of the poor.”<sup>13</sup> What Foucault intends to make clear about this model is what these duties can be condensed into—that they are *urban objects*. An urban object is “urban in the sense that some only exist in the town and because there is a town. [...] Others are objects that are problems falling under police inasmuch as they are especially significant in towns,” or, more plainly, they are “problems of coexistence, and of dense coexistence.”<sup>14</sup> This form of police cannot exist without an urban center or centers, and their domains are social and financial.

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<sup>11</sup> Foucault, 315.

<sup>12</sup> Cited as Delamare in *Security, Territory, Population*; cited as De Lamare in *Essential Works of Foucault*.

<sup>13</sup> Foucault, *Security, Territory, Population: Lectures at the Collège De France, 1977-1978*, 334.

<sup>14</sup> *Ibid.* 335.

It is key to note that their function was *never*, at any point, intended to be judicial: “[p]olice is not justice. Whether written by those who support and justify the need for a police, or by jurists or parliamentarians who display a certain mistrust of police, all the texts agree on this: police is seen as not being justice. Of course, like justice it derives from royal power, but it remains clearly separated from justice.”<sup>15</sup> The apparatus of the police “does not operate through the judicial apparatus, but is a permanent *coup d’État* coming directly from the royal power, but what is the instrument of this permanent *coup d’État*? [...] Police intervenes in a regulatory manner. [...] We are in a world of indefinite regulation, of permanent, continually renewed, and increasingly detailed regulation, but always regulation, always in the kind of form that, if not judicial, is nevertheless juridical: the form of the law, or at least of law as it functions in a mobile, permanent, and detailed way in the regulation.”<sup>16</sup>

*ii. 18th Century Reforms of Police Theory and Police Forces*

Predictably, this idea of an utopic police state crumbles in the face of reality, and theory of policing evolves to take a new form. There is something suspect about a theory of governance that espoused the following: “[t]he police includes everything. But from an extremely particular point of view. [...] Men's coexistence on a territory; their relationships as to property; what they produce; what is exchanged on the market. It also considers how they live, the diseases and accidents that can befall them”—Foucault rightly notes this vastness of their role reeks of authoritarianism.<sup>17</sup> It is unsurprising that, eventually, there were alternatives proposed to this theory. Furthermore, as European nations became more and more mercantilist, accruing the most wealth became one of the state’s primary objectives. In order to accomplish this, they had to manage growing their populations and producing goods to trade, all while ensuring as little

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<sup>15</sup> Ibid. 339.

<sup>16</sup> Ibid. 340.

<sup>17</sup> Foucault, *Essential Works of Foucault, 1954-1984: Power*, 319.



payment as feasible ever reached the hands of the very producers of goods that the state trades.<sup>18</sup> With such a model of “equilibrium,” police makes itself a necessary instrument for any country that wanted to be commercially viable within such a system.<sup>19</sup> It is little surprise that, with an economic overhaul such as this, it was the *économistes* who proposed a new system of discipline in this era; French jurists, though critical, didn't clamor for a new system to replace the current police. The issue the *économistes* took with the idealized model of the seventeenth century was due to a new form of governmentality, one that gave new form and focus to state rationality (*raison d'État*)—that is, how the state organizes itself and carries out its various functions.<sup>20</sup>

For what kinds of change did the *économistes* advocate? Theirs, rather self-evidently, was of a more economic focus than the theory of what Foucault refers to as the *politiques*, creating a “new naturalness” in the state's economy that is “specific to relations between men, to what happens spontaneously when they cohabit, come together, exchange, work, and produce [...] the naturalness of society.”<sup>21</sup> They utilize “scientific knowledge” or rationality to fortify the *raison d'État*, hence the shift from solely militaristic or diplomatic views; there is now a need for analysis and empirical evidence in government, establishing a firm link between the art of government and science.<sup>22</sup> There is also a new emphasis on the management of population, not merely on the increase or decrease of one's population, but rather as it is relevant to the exchange, creation, and distribution of funds—that is, discipline, as will later be discussed—, as well as new limitations the government placed upon its ministrations to society.<sup>23</sup> The idea that the state was to be shepherd and sheepdog within the same organizations was identified as naïve

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<sup>18</sup> Foucault, *Security, Territory, Population: Lectures at the Collège De France, 1977-1978*, 337.

<sup>19</sup> *Ibid.* 338.

<sup>20</sup> *Ibid.* 348.

<sup>21</sup> *Ibid.* 349.

<sup>22</sup> *Ibid.* 350-351.

<sup>23</sup> *Ibid.* 351-352.

and unworkable, replaced by a new objective of creating mechanisms of security, “the security of the natural phenomena of economic processes or processes intrinsic to population.”<sup>24</sup>

As the effects of specialization and “scientific knowledge” seep into other areas of theory of governance, the previous intended role of the police is halved: “[g]rowth within order and all positive functions will be answered by a whole series of institutions, apparatuses, mechanisms, and so on, and then the elimination of disorder will be the function of the police.”<sup>25</sup> Where the previous model of policing had some positive function in engaging in various acts of care or concern for improving the wellbeing of society through education or charity, it now retains only its negative charge—to suppress the many forms of disorder that cause disruptions within the community. In practice, French police also became much more concerned with “crimes of fraud” within the eighteenth century, as financial crime replaced violent crime as the most common form of criminality.<sup>26</sup> Partly due to this shift in criminal activity, as well as the general populace’s migration from rural areas to preexistent and new urban centers, police takes on an even greater role in surveilling society, as, in order to keep its power over a populace, it must “be given the instrument of permanent, exhaustive, omnipresent surveillance, capable of making all visible, as long as it could itself remain invisible. It had to be like a faceless gaze that transformed the whole social body into a field of perception: thousands of eyes posted everywhere, mobile attentions ever on the alert, a long, hierarchized network.”<sup>27</sup>

The *économiste* theorists had so changed the conceptualization of community management and police that the welfare aspects had completely evaporated, instead replaced by a preoccupation with this notion of “safety”—of a mainly economic mien. What these

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<sup>24</sup> Ibid. 353.

<sup>25</sup> Ibid. 354.

<sup>26</sup> Foucault, *Discipline & Punish*, 77.

<sup>27</sup> Ibid. 214.

seventeenth- and eighteenth-century intellectuals “understand by ‘police’ is not an institution or mechanism functioning within the state but a governmental technology peculiar to the state—domains, techniques, targets where the state intervenes.”<sup>28</sup> At this time, there were, of course, constables and officials whose roles we vaguely recognize as precursors of the ‘police’ of today, but alongside them came the development of other sciences to regulate relationships between and attitudes of the state’s populace. Though distinct from one another, these institutions, these apparently independent expressions of state power never separated in their primary function, nor departed from their relative codependence on one another.

### *iii. The Development and Evolution of American Policing*

For a significant period of time in the post-Revolution United States, there was no centralized or government-funded police force, just as there was no national militia. In line with the development of police forces in European nations, the first locations in America to develop their own form of community policing were major cities: “Boston created a night watch in 1636, New York in 1658 and Philadelphia in 1700.”<sup>29</sup> These night watches were funded by private citizens, and those serving the community were part time “volunteers”—though it is worth noting these volunteers did not always fulfill their promised services, nor were they necessarily qualified for their positions, as many were “attempting to evade military service, were conscripts forced into service by their town, or were performing watch duties as a form of punishment.”<sup>30</sup> In addition to their disorganized and undisciplined workforce, these watch systems had duties that extended beyond “keeping the peace”. Adopting some of the aspects of Turquet’s system of police utopia, members of the watch were expected to “[provide] social services, including

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<sup>28</sup> Foucault, “Omnes et Singulatim: Toward a Critique of Political Reason” in *Essential Works of Foucault, 1954-1984: Power*, 317.

<sup>29</sup> Potter, “The History of Policing in the United States, Part 1.”

<sup>30</sup> *Ibid.*

lighting street lamps, running soup kitchens, recovering lost children, capturing runaway animals, and a variety of other services.”<sup>31</sup> This disorganized force was eventually overseen and phased out by the implementation of constables in major cities, whose duties were not only peace-keeping, criminal-retrieval, and crime-deterrence, but also “serving as land surveyors and verifying the accuracy of weights and measures. In many cities constables were given the responsibility of supervising the activities of the night watch.”<sup>32</sup> Eventually, the distinct roles of constable and night watchman merged as their external duties fell away or were appropriated by other social apparatuses. With the ‘birth’ of the American municipal police force in Boston in 1860—and, more significantly, the other major cities that followed its example—, there emerged the “framework” of our modern forces, the major characteristics of which police scholar Gary Potter aptly identifies: “(1) they were publicly supported and bureaucratic in form; (2) police officers were full-time employees, not community volunteers or case-by-case fee retainers; (3) departments had permanent and fixed rules and procedures, and employment as a police officers was continuous; (4) police departments were accountable to a central governmental authority.”<sup>33</sup> These core aspects of the foundation of the municipal police are symptomatic of the large-scale movement towards federalization of apparatuses of public defense and welfare.

Notably distinct from the European theorizations of police was the racial element in American Police history, which was the driving impetus behind the creation of a different kind of police force in the South: the slave patrol. The first of these was founded in the Carolinas in 1704. Its functions were “(1) to chase down, apprehend, and return to their owners, runaway slaves; (2) to provide a form of organized terror to deter slave revolts; and, (3) to maintain a form of discipline for slave-workers who were subject to summary justice, outside of the law, if they

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<sup>31</sup> Virginia Wesleyan University, “Cops of History: A Law Enforcement Timeline: VWU Online.”

<sup>32</sup> Potter, “The History of Policing in the United States, Part 1.”

<sup>33</sup> Ibid.

violated any plantation rules.”<sup>34</sup> Though the treatment of minorities and immigrants to the United States was hardly much fairer or friendlier in the great northern cities, the roots and functions of the slave patrol undeniably bled into the later evolutions of police in the postbellum South with an explicitly anti-black agenda, “primarily as a means of controlling freed slaves who were now laborers working in an agricultural caste system, and enforcing ‘Jim Crow’ segregation laws, designed to deny freed slaves equal rights and access to the political system.”<sup>35</sup>

What remains consistent in all this? There is, in all the systems outlined and followed through the Enlightenment period, a push towards centralization of governance and regulation of the social body by a whole host of public institutions. Alongside this, there is a categorization and hierarchization of previously unmanaged, “wild” territory: a careful observation and management of the relationships and exchanges between individuals, sometimes under the guise of facilitation, other times, as is the case for ‘police’, under the guise of safeguarding. There are great incentives for the state to surveil its populace, to guide it, without forcing it, into adopting certain customs and practices that benefit the economy, as well as to guard against any circumventing of the new ideas of governmentality. Police begins to grow into its new role, its bureaucratic nature—at the very least in the American scheme of governance—serving eventually to warp and shift the priorities of the institution in a variety of lucrative and abusive ways. These will soon be dragged into the light for the purpose of public scrutiny and academic discourse, but not before the relevant, essential elements of Foucault’s work on power are made clear. It is essential to this undertaking that one is familiar with his understanding of relationships between institutions and relationships of power; it is through his work that we come closer to

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

understanding the currents between bodies of influence and how it is that they so effectively impact and manage our lives.

## II. Foucault on Power (and Theory in General)

One can easily be forgiven for assuming from the previous section of this inquiry that it preceded a historical or political critique of policing, but that is not this project's sole intention. While the background of the history of police theory and its key concepts and themes are essential for understanding the development of police from the seventeenth and eighteenth centuries to the present, looking at police theory more broadly, one will be able to see a framework that one may find the police have in common with other social institutions that, at first, seem not to have similar ends—that is, until one simplifies them and thinks of their goals in terms of the state: discipline, surveillance, control, prosperity. The police are not an isolated entity; they are inextricable from the weblike structure that connects all of the state's apparatuses of power. Furthermore, though the history of the police and policing is of use to this work, it is necessary to emphasize that neither the history of policing nor that of police theory can be taken as determinative of the present. While clearly the present always results from the past, determinism has no place in Foucault's works, nor in this project. The relationship of the past, in all of its complexity, to the present, in all of *its* complexity, can never be reduced to any sort of linear or simple causality.

### *i. Foucault on Power, Relations of Power, and the Truth-Power Dynamic*

Foucault has a very particular understanding of power. When discussing the forms and development of “state rationality” and the precursors to modern “governmentality,” he elaborates more overtly than is typical on his unique outlook on this hierarchy-enforcing function:

Power is not a substance. Neither is it a mysterious property whose origin must be delved into. Power is only a certain type of relation between individuals. Such relations are

specific, that is, they have nothing to do with exchange, production, communication, even though they combine with them. The characteristic feature of power is that some men can more or less entirely determine other men's conduct—but never exhaustively or coercively. A man who is chained up and beaten is subject to force being exerted over him, not power. But if he can be induced to speak, when his ultimate recourse could have been to hold his tongue, preferring death, then he has been caused to behave in a certain way. His freedom has been subjected to power. He has been submitted to government. If an individual can remain free, however little his freedom may be, power can subject him to government. There is no power without potential refusal or revolt.<sup>36</sup>

From this, there is the obvious takeaway that Foucault would disdain a Platonic effort to discover the ultimate “form” of power—or *any* such ideal “form,” for that matter—as pointless and devoid of content, but, far more significant than that is his idea that power necessarily relies on relationships, on social exchange in order to exist. While it seems at first a more sociological claim and perspective than philosophical—and certainly there is an aspect of Foucault’s work that is overtly sociological or anthropological—this view of the power relation has its roots in Hegelian thought. Relationships that exert power over a subject appear frequently to take a prescriptive form: consider Foucault’s interest in medicine, psychiatry, social forms of regulation of commerce and communication, and the work of Enlightenment intellectuals and reformers. There is something about this kind of authority that is not “totalitarian” or domination over the subject in the lesser role as there seems to be in the sense of the master-slave dynamic, but there is nevertheless an inarguable power imbalance between doctor-patient, teacher-student, and police-civilian. Beyond this, there is another, perhaps less stable web of relationships of power

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<sup>36</sup> Foucault, “Omnes et Singulatim: Toward a Critique of Political Reason” in *Essential Works of Foucault, 1954-1984: Power*, 324.



between institutions that serve the state—how the sciences interact with one another, adding to or disputing the authority of another. Foucault himself recognizes three distinct forms of power struggle: “against forms of domination (ethnic, social, and religious); against forms of exploitation that separate individuals from what they produce; or against that which ties the individual to himself and submits him to others in this way.”<sup>37</sup>

The situation he uses to illustrate how power is exerted over another is a curious one. It is only by the confession extracted from him that the tortured man’s captors have power over him, and not by mere virtue of their physical domination of him. In this case, it becomes a use of power because the man had the option to remain silent, to, in a way, refuse to be a party to this power play, even if it meant his death. Foucault claims that, “[i]f an individual can remain free, however little his freedom may be, power can subject him to government. There is no power without potential refusal or revolt.”<sup>38</sup> This is perhaps one of the most controversial and—initially—least intuitive aspects of Foucault’s definition; it even goes against the Hobbesian belief that coercion is a necessary component of such covenants between men, groups, or nations<sup>39</sup>. Foucault believes that the “choice” for one to do otherwise, *autonomy*, is necessary for there to be power exerted over an individual—without that possibility, as discouraged and inadvisable as rebellion or refusal may be in a situation, there is no need for power to coerce or guide someone without it. One cannot exert “power” over a robot, only control over its actions, because, at least at present, there is no consciousness or program running within it that would propose a different course of action: all it “knows” are the instructions given to it. It is by virtue of his consciousness, his ability to refuse and to be uncooperative that the

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<sup>37</sup> Foucault, “The Subject and Power” in *Essential Works of Foucault, 1954-1984: Power*, 331.

<sup>38</sup> Foucault, “Omnes et Singulatim: Toward a Critique of Political Reason” in *Essential Works of Foucault, 1954-1984: Power*, 324.

<sup>39</sup> Hobbes, “Leviathan” in *Political Philosophy: The Essential Texts*, 323.

man, when conceding to his captors, was subjected to power.<sup>40</sup> To apply this to the conceptualization of power as it is present in members of respected institutions' relationships with the greater public is quite simple; the learning, training, or occupation of certain individuals places them in a position of authority over members of a society—and the society's acceptance of this assertion of authority creates their power over public opinion, the permissible acts of civilians, and so on.

One would not be remiss in asking, however, what basis and qualities exactly the nature of the relationship between individuals that exerts some form of authority or control has. It may be easier to begin by outlining what the relationship is not, or at least, is not entirely. Foucault cautions against viewing power as *repression*, as he considers it “quite inadequate for capturing what is precisely the productive aspect of power. In defining the effects of power as repression, one identifies power with a law that says no—power is taken, above all, as carrying the force of a prohibition. Now, I believe that this is a wholly negative, narrow, skeletal conception of power, one that has been curiously widespread. If power were never anything but repressive, if it never did anything but to say no, do you really think one would be brought to obey it? What makes power hold good, what makes it accepted, is simply the act that it doesn't only weigh on us as a force that says no; it also traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network that runs through the whole social body, much more than as a negative instance whose function is repression.”<sup>41</sup> To understand the mechanisms of power, it is perhaps more beneficial to consider it in terms of *oppressive* relations between people.

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<sup>40</sup> It is well worth asking what good this “freedom” does the man subjected to power, and whether it can bring him anything more than awareness of his inferiority to and subjugation by government. Part of this project will attempt to address this question.

<sup>41</sup> Foucault, “Truth and Power” in *Essential Works of Foucault, 1954-1984: Power*, 120.

Foucault also disagrees with assigning the concept of power an inherently militaristic aspect: “[a]s soon as one endeavors to detach power with its techniques and procedures from the form of law within which it has been theoretically confined up until now, one is driven to ask this basic question: Isn't power simply a form of warlike domination? [...] A whole range of problems emerge here. Who wages war against whom? Is it between two classes, or more? Is it a war of all against all? What is the role of the army and military institutions in this civil society where permanent war is waged? What is the relevance of concepts of tactics and strategy for analyzing structures and political processes? All these questions need to be explored. In any case, it's astonishing to see how easily and self-evidently people talk of warlike relations of power or of class struggle without ever making it clear whether some form of war is meant, and if so what form”<sup>42</sup>. Foucault finds this oversimplification of power as a militaristic phenomenon unhelpful, as his understanding of relations of power has more nuance and plenty of variation in its subtly oppressive manifestations. Similarly, he insists that it is not a matter of some consensual agreement—at least, not necessarily: “[i]n itself, it is not the renunciation of freedom, a transfer of rights, or power of each and all delegated to a few [...]; the relationship of power may be an effect of a prior or permanent consent, but it is not by nature the manifestation of a consensus.”<sup>43</sup> Foucault acknowledges that often threats of violence or the obtaining of consent has some bearing on power relations, but it is most beneficial and accurate to think of them as “a set of actions on possible actions; [a power relation] incites, it induces, it seduces, it makes easier or more difficult; it releases or contrives, makes more probable or less; in the extreme, it constrains or forbids absolutely, but it is always a way of acting upon one or more acting subjects by virtue of their acting or being capable of action.”<sup>44</sup>

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<sup>42</sup> Ibid. 123-124.

<sup>43</sup> Foucault, “The Subject and Power” in *Essential Works of Foucault, 1954-1984: Power*, 340.

<sup>44</sup> Ibid. 341.

Power relations can be studied quite effectively as they exist in the form of the “expert’s opinion” or the strong recommendations of apparatuses of the state, directives the populace has the ability to defy, but, either from fear, respect, or some other conditioning, they choose to obey. This is not to say that power is institutional; Foucault makes clear that he believes “one must analyze institutions from the standpoint of power relations, rather than vice versa, and that the fundamental point of anchorage of the relationships, even if they are embodied and crystallized in an institution, is to be found outside the institution.”<sup>45</sup> Contrary to Hobbes, Foucault believes that science, or, in his terms, *knowledge*, is one of the most effective and prevalent vectors through which power is exerted over others.<sup>46</sup> The many institutions of government or those unaffiliated that nevertheless serve the aims of the class or person(s) in power, such as schools, prisons, the military, the natural sciences (medicine, psychiatry, etc.) wield a subtler authority over the public, but it is nevertheless an effective and “official” authority in their assigned realms of influence. These institutions are a productive power, rather than *merely* oppressive or restrictive: they produce knowledge, and at the same time, that knowledge is used to condition a populace’s attitudes and behavior. These relations of power are much more flexible than a rigid caste system, or conquerors physically subjugating the conquered. They seek to instill in the communities they manage a perpetual evolution of and continued need for the services they provide, all while reinforcing the authority of the governing body to which they belong or are beholden.

Despite its close connection to fields of science, it would be a mistake to qualify power as necessarily aligning with “truth”—or it being contingent on there being a truth at all. Foucault defines truth as “a system of ordered procedures for the production, regulation, distribution,

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<sup>45</sup> Ibid. 343.

<sup>46</sup> Hobbes, “Leviathan” in *Political Philosophy: The Essential Texts*, 316.

circulation, and operation of statements,” and claims it is “linked in a circular relation with systems of power that produce and sustain it, and to effects of power which it induces and which extend it—a ‘regime’ of truth.”<sup>47</sup> This is not an especially flattering portrayal of the role of truth in society; Foucault’s conception of it falls in line with Nietzsche’s, in which it is a subjective concept and is necessarily related to some external politics. Foucault further distances himself from the traditionalist, moralist view of “objective truth”:

[T]ruth isn't outside power or lacking in power: contrary to a myth whose history and functions would repay further study, truth isn't the reward of free spirits, the child of protracted solitude, nor the privilege of those who have succeeded in liberating themselves. Truth is a thing of this world: it is produced only by virtue of multiple forms of constraint. And it induces regular effects of power. Each society has its regime of truth, its ‘general politics’ of truth—that is, the types of discourse it accepts and makes function as true; the mechanisms and instances that enable one to distinguish true and false statements; the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.<sup>48</sup>

The major takeaways here are that “social” truth is not objective, it is not “transcendent”—or the fruit of enlightened thought, and it is inherently political in nature. This does not detract from the “value” of truth, but it does alter it; it has been dragged down from its illusory pedestal into the muck of power relations alongside knowledge and “reason,” now able to be better understood in its function since its glamor has been stripped away. If truth is what proofs or “laws” are established by a particular society in order to function, then it stands to

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<sup>47</sup> Foucault, “Truth and Power” in *Essential Works of Foucault, 1954-1984: Power*, 132.

<sup>48</sup> *Ibid.* 131.

reason that, if they are unsatisfactory to the governed, they might be disputed and overthrown. Foucault believes that “[t]he essential political problem for the intellectual is not to criticize the ideological contents supposedly linked to science, or to ensure that his own scientific practice is accompanied by a correct ideology, but that of ascertaining the possibility of constituting a new politics of truth. The problem is not changing people's consciousness—or what’s in their heads—but the political, economic, institutional regime of the production of truth.”<sup>49</sup> In order to bring about effective change in a society, one has to work to change the basis upon which it functions, rather than trying to convince people to go against their community or state’s norms and beliefs.

*ii. Governmentality: Foucault on State Rationality*

It may also be useful to briefly touch on the subject of state rationality, or *raison d’État*. A product of the enlightenment era, the “art of government” has a somewhat different aim than that of the previous widely-employed model of governance of the feudal sovereign. This new idea’s “task is absolutely specific: it consists in governing, and its model is found neither in God nor in nature. At the end of the sixteenth century, the emergence of the specificity of the level and form of government is expressed by the new problematization of what was called the *res publica*, the public domain or state (*la chose publique*).”<sup>50</sup> One should make particular note of the mention of specificity, as this is one of the most significant differences between this new “art of government” and the sovereign or Prince—à la Machiavelli—, as it concerns itself more with particulars, with the molecular level of society, than the previous heads of states. It is distinct from and greater in scale than the domain of the sovereign, it is not inherently pastoral, it is separate from—and sometimes even opposes—the dictum of the “natural order of things”.

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<sup>49</sup> Ibid. 132-133.

<sup>50</sup> Foucault, *Security, Territory, Population: Lectures at the Collège De France, 1977-1978*, 236.

Foucault describes its earliest form thus: “this something without a model, which must find its model, is the art of government.”<sup>51</sup> According to Botero, *raison d’État* is “the knowledge of the appropriate means for founding, preserving, and expanding [a domination over peoples],” which is certainly an accurate enough description for what it becomes.<sup>52</sup>

As a matter of self-preservation, a state must continue to expand its influence and amass power in order to survive encounters with enemy states or other threatening forces, and so it must find ways to strengthen itself.<sup>53</sup> One such way is, obviously, through doing well in trade, dominating the economic sphere of human relations. This revelation explains the sudden interest in the molecular, individual level of society; because “reason of state is not an art of government according to divine, natural, or human laws[, it] doesn't have to respect the general order of the world. It's government in accordance with the state's strength. It's government whose aim is to increase this strength within an extensive and competitive framework,” it has incentive and plenty to gain from effective management of its resources, both in terms of trade and labor.<sup>54</sup> This “art of government” necessitates the creation of artificial concepts and guidelines in order to function efficiently; it is no coincidence that theory of economics, police, and property law become of such great import at the same time that the state's methods and focus are shifting and expanding according to this new rationality. *Raison d’État* is “intimately bound up with the development of what was then called either political ‘statistics’ or ‘arithmetic,’ that is, the knowledge of different states’ respective forces,” which gives this style of governance a distinct advantage over other forms in terms of the economic and social power it commands through this

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<sup>51</sup> Ibid. 237.

<sup>52</sup> Ibid. 238.

<sup>53</sup> Foucault, “Omnes et Singulatim: Toward a Critique of Political Reason” in *Essential Works of Foucault, 1954-1984: Power*, 316.

<sup>54</sup> Ibid. 317.

specific knowledge—and the specialized control this knowledge makes possible—that it has of its citizens’ activities.<sup>55</sup>

The “modern” state, though it does recognize class and specific groups, majorities and minorities, no longer remains on the molar level of governance. Foucault notes this as the unique strength of its design, as it is “both an individualizing and a totalizing form of power. [...] This is due to the fact that the modern Western state has integrated into a new political shape an old power technique that originated in Christian institutions. We can call this power technique ‘pastoral power.’”<sup>56</sup> It is distinct from pastoral power in its traditional form, though, mainly in that it is not necessarily religious. The objective of this new “secular” pastoral power was “no longer [to lead] people to their salvation in the next world but rather, ensuring it in this world. And in this context, the word ‘salvation’ takes on different meanings: health, well-being (that is, sufficient wealth, standard of living), security, protection against accidents. A series of ‘worldly’ aims took the place of the religious aims of the traditional pastorate.”<sup>57</sup> Such a complex network of fields could not be overseen by the old form of government; many new institutions rose up to fill the needs of the state and enact its aims, diverse in their alignment: “[s]ometimes this form of power was exerted by state apparatus or, in any case, by a public institution such as the police. [...] Sometimes the power was exercised by private ventures, welfare societies, benefactors, and generally by philanthropists. But ancient institutions, for example the family, were also mobilized at this time to take on pastoral functions.”<sup>58</sup> Each different apparatus of state power had specific spheres of influence assigned as their domain in accordance with their size and intended function. To summarize their general functions and goals, every one of these

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<sup>55</sup> Ibid.

<sup>56</sup> Foucault, “The Subject and Power” in *Essential Works of Foucault, 1954-1984: Power*, 332.

<sup>57</sup> Ibid. 334.

<sup>58</sup> Ibid.



apparatuses that were formed or drawn in to serve the state, had one of two focuses: “one, globalizing and quantitative, concerning the population; the other, analytical, concerning the individual.”<sup>59</sup>

*iii. Foucault on History as Pertains to Determinism*

There is one important aspect of Foucault’s conceptualization of power that rests on a much larger tenet of his philosophical and genealogical works: he does not indulge the idea that there is some “necessity” of past events in bringing about the present. In an interview where Foucault is asked to elaborate upon his idea of discontinuity in history, and his criticisms of structuralist views—that hold that history necessarily “builds up from” the past—he takes care to clarify that “[his] problem was not at all to say ‘Voilà, long live discontinuity, we are in the discontinuous and a good thing too,’ but to pose the question ‘How is it that at certain moments and in certain orders of knowledge, there are these sudden take-offs, these hastenings of evolution, these transformations which fail to correspond to the calm, continuist image that is normally accredited?’”<sup>60</sup> His denial of a deterministic view of history, that things must play out in such and such way because of such and such past actions does not mean he believes that history or genealogical work is worthless; what Foucault seems to find interesting—and worthy of closer study—in history is “not that such changes can be rapid and extensive or, rather, it is that this extent and rapidity are only the sign of something else—a modification in the rules of formation of statements which are accepted as scientifically true. Thus, it is not a change of content [...], nor is it a change of theoretical form [...]. It is a question of what governs statements, and the way in which they govern each other so as to constitute a set of propositions that are scientifically acceptable and, hence, capable of being verified or falsified by scientific

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<sup>59</sup> Ibid. 335.

<sup>60</sup> Foucault, “Truth and Power” in *Essential Works of Foucault, 1954-1984: Power*, 114.

procedures.”<sup>61</sup> Though speaking specifically about “truths” and beliefs here, what Foucault says about what makes them interesting can be applied more broadly. Noticing not just the content of the history of a field, but its quickenings or stagnations, its sharp departures from tradition or its dogged steadfastness to the old ideas can be just as interesting to consider in terms of their influence—and what that influence has done or of what it is emblematic—than concrete events.

From *The History of Madness*, to *The Archaeology of Knowledge*, to *Discipline & Punish*, Foucault’s underlying common interest throughout these works appears to be primarily vested in uncovering and dissecting “internal regimes of power” in different “objective” fields and the subtlety of their manifestations, and history provides some degree of causality, though it is important to note that he makes use of the genealogy of institutions in his works quite differently than a Hegelian might.<sup>62</sup> He is adamant that “[h]istory has no ‘meaning,’ though this is not to say that it is absurd or incoherent. On the contrary, it is intelligible and should be susceptible of analysis down to the smallest detail—but this is in accordance with the intelligibility of struggles, of strategies and tactics. Neither the dialectic, as the logic of contradictions, nor semiotics, as the structure of communication, can account for the intrinsic intelligibility of conflicts.”<sup>63</sup> That something happened in the past is not irrefutable proof that the present could not be as it is without that event necessarily occurring, but that is not to say that Foucault doesn’t believe there is a causal relationship between history and the current time. As he puts it, “maybe intelligibility in history does not lie in assigning a cause that is always more or less a metaphor for the source. Intelligibility in history would perhaps lie in something that we could call the constitution or composition of effects.”<sup>64</sup> When discussing the significance

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<sup>61</sup> Ibid.

<sup>62</sup> Ibid. 114.

<sup>63</sup> Foucault, 116.

<sup>64</sup> Foucault, *Security, Territory, Population: Lectures at the Collège De France, 1977-1978*, 239.

assigned to and use of events in his work, Foucault urges those reading it—and engaging in his kind of historical work—to avoid “trying to do for the event what was previously done with the concept of structure. It's not a matter of locating everything on one level, that of the event, but of realizing that there are actually a whole order of levels of different types of events differing in amplitude, chronological breadth, and capacity to produce effects.”<sup>65</sup> Events remain critical for understanding the present, but Foucault stresses their greatest utility arises not from considering instances in isolation, but from distinguishing them from one another, exploring their relations, connections to one another, and what, alone and together, they suggest about the field or network to which they belong.<sup>66</sup>

The main things to keep in mind when applying these concepts as Foucault conceives of them are that, for one, it is misguided to think of things like “power” and “truth” as having forms in the Platonic sense; it is much more accurate and useful to view these as the social phenomena that they are, which are inextricable from relations between people that exist on a variety of different socio-political axes. Second, that the interest of the “modern” government is to manage and oversee these axes, from the major to the most minute spheres of influence and exchange, and that the focus has been on developing technologies and techniques to aid it in its self-management. Third, though the evolution of state rationality and the evolution of police are not only related but share a great interest in surveillance and discipline of citizens is not the inevitable outcome of certain events or institutions belonging to the past; it is the nature of power to want to expand its influence in whatever ways it is able, but the manifestation of power in relations between states, groups, or individuals is not predetermined by their history.

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<sup>65</sup> Foucault, “Truth and Power” in *Essential Works of Foucault, 1954-1984: Power*, 115-116.

<sup>66</sup> *Ibid.* 116.

### III . The Overreach of State Power in Policing; or, Nothing to Hide, Plenty to Fear

The police have undoubtedly become a very effective means of intra-state control, and the tactics they employ to retain such a tight leash on the average citizen are many—not to mention often invasive or incendiary. Despite plenty of footage showing the intimidating and destructive force of SWAT teams and the wealth of horrifying bodycam footage of the conduct of law enforcement officials that now exists, the accumulation of power by the police has largely occurred through peaceful means. Foucault describes “[p]olice [as] the direct governmentality of the sovereign qua sovereign. Or, again, let’s say that police is the permanent *coup d’État*. It is the permanent *coup d’État* that is exercised and functions in the name of and in terms of the principles of its own rationality, without having to mold or model itself on the otherwise given rules of justice.”<sup>67</sup> It is an apparatus of power that, in its present iteration, serves the state through monitoring the activities of its citizens and, when necessary, responding in some “appropriate” way to the “wayward” members of society. These duties are key elements of Foucault’s study of the function and “corrective” measures of prisons, though the duty of police is markedly different than that of wardens or reformers at a correctional facility. In *Discipline and Punish*, Foucault says this of discipline:

‘Discipline’ may be identified neither with an institution nor with an apparatus; it is a type of power, a modality for its exercise, comprising a whole set of instruments, techniques, procedures, levels of application, targets; it is a ‘physics’ or an ‘anatomy’ of power, a technology. And it may be taken over either by ‘specialized’ institutions (the penitentiaries or ‘houses of correction’ of the nineteenth century), or by institutions that use it as an essential instrument for a particular end (schools, hospitals), or by

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<sup>67</sup> Foucault, *Security, Territory, Population: Lectures at the Collège De France, 1977-1978*, 339.

pre-existing authorities that find in it a means of reinforcing or reorganizing their internal mechanisms of power [...]; or by apparatuses that have made discipline their principle of internal functioning (the disciplinarization of the administrative apparatus from the Napoleonic period), or finally by state apparatuses whose major, if not exclusive, function is to assure that discipline reigns over society as a whole (the police)<sup>68</sup>.

Notice that Foucault stresses the breadth of impact of discipline and what effects, ideally, it should have on those being disciplined—and also remember what importance he shows this phenomenon to have to police. The police have been entrusted with enforcing discipline within society as a whole rather than being gifted some subtle set of tools with which to condition some sect of the populace; their methods of enforcing discipline, however, make them better described as a security force. Foucault is adamant that there are significant differences between apparatuses of discipline and apparatuses of security, with discipline referring to *knowledge production* in this context as opposed to *training* or *conditioning* a populace. One of the major differences he stresses is that “[discipline] divide[s] everything according to a code of the permitted and the forbidden. Then, within these two fields of the permitted and the forbidden, they specify and precisely define what is forbidden and what is permitted, or rather, what is obligatory”<sup>69</sup>. The function of disciplinary institutions is “not so much [on] the things one must not do as the things that must be done. A good discipline tells you what you must do at every moment.”<sup>70</sup> Security, by contrast, is concerned with a different end entirely, as “what is involved is precisely not taking either the point of view of what is prevented or the point of view of what is obligatory, but standing back sufficiently so that one can grasp the point at which things are taking place,

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<sup>68</sup> Foucault, *Discipline & Punish*, 215-216

<sup>69</sup> Foucault, *Security, Territory, Population: Lectures at the Collège De France, 1977-1978*, 46.

<sup>70</sup> Ibid.

whether or not they are desirable.”<sup>71</sup> The police are neither prescriptive nor corrective, but *reactive*. The actions they take upon the intended targets, the acted upon, are not deliberated upon beforehand in terms of reinforcing values, but of responding to what is in reality. The function of police, then, is security, which “tries to work within reality, by getting the components of reality to work in relation to each other, thanks to and through a series of analyses and specific arrangements.”<sup>72</sup> Looking at the expectations for United States state and local law enforcement, police forces “are charged with upholding domestic laws that protect the rights of citizens. Although they ‘combat’ crime within their jurisdictions, their goal is to not physically annihilate criminals, but to maintain public order and ‘keep the peace.’ They are to protect the rights of the citizenry, both victims and criminals alike. In the realm of domestic policing, the police are, in principle, trained to resort to violence only as a matter of last resort.”<sup>73</sup> This corroborates the idea that they are not explicitly a force for discipline—that would fall to the much more regulatory models for police coming out of the sixteenth century, the idealized figures of community control that had a properly disciplinary function.

Foucault’s ambiguous definition of security’s way of responding to situations in reality may read as slightly ominous to the modern reader, and this is with good cause. The police’s function as security is for the state, not for the acted upon, and, accordingly, it is not always pleasant—seemingly rarely the case, in fact—for those acted upon. Time and time again, much like similar apparatuses of power, it has tested the bounds of what behavior can be excused as acceptable in the eyes of the courts and has largely been rewarded for its audacity. Over time, a significant amount of power and authority has been willingly relinquished to law enforcement officers by the public and by the judiciary—though this accumulation of power has been greatly

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<sup>71</sup> Ibid.

<sup>72</sup> Ibid. 47.

<sup>73</sup> Hall & Coyne, “The Militarization of U.S. Domestic Policing” in *The Independent Review* 17, no. 4, 486.

aided by complex relationships of mutually beneficial natures between the police and other institutions, state-funded and otherwise. Another aspect of the nature of security in opposition to discipline bears keeping in mind when engaging with what follows: apparatuses of security are centrifugal<sup>74</sup>. This means that they are always trying to expand the scope of their involvement and control, whereas apparatuses of discipline encompass their whole ‘sphere’ of influence and must constrain their focus to act.<sup>75</sup>

*i. The Surveillance State*

Before diving into the tangled, messy network of private and public institutions that enable one another to engage in grievous encroachments upon the rights of private citizens, there is one such right that has been steadily eroded from the time of Enlightenment scholars onwards—the right to privacy. In terms of the police, however, this violation of the privacy of individuals is not a “bug,” but a “feature,” and, to a degree, a very necessary one that allows the police to function: “[police] is an apparatus that must be coextensive with the entire social body and not only by the extreme limits that it embraces, but by the minuteness of the details it is concerned with. Police power must bear ‘over everything’: it is not however the totality of the state nor of the kingdom as visible and invisible body of the monarch; it is the dust of events, actions, behaviour, opinions—‘everything that happens.’”<sup>76</sup> From the plainclothes agents of the police on the streets and their many informants in the eighteenth century to today’s drones, CCTV cameras posted in public areas, and even one’s own phone line, policing depends on monitoring flows of activity within society in whatever form they may take, digital or physical.

Inarguably, methods of surveillance have become more invasive and inescapable than ever before. Technology has come a long way in the past half-century, and the police, among

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<sup>74</sup> Foucault, *Security, Territory, Population: Lectures at the Collège De France, 1977-1978*, 45.

<sup>75</sup> *Ibid.* 44-45.

<sup>76</sup> Foucault, *Discipline & Punish*, 213.

other groups, have benefited greatly from these breakthroughs. Unlike with civilians, there have been few meaningful constraints on what once only select branches of the military or government agencies would have had at their disposal; “technologies once used exclusively by the military, such as facial-recognition systems, thermal imaging, satellite monitoring, and retinal scanners, are now regularly transferred to and utilized by police agencies across the country for domestic activities.”<sup>77</sup> What makes this phenomenon especially notable—and, by extension, objectionable—is that this practice of mass surveillance by government- and state-funded agencies is very much at odds with the supposed inalienable rights granted to American citizens. The Fourth Amendment to the U.S. Constitution asserts “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” This right has been eroded over time courtesy of bureaucratic meddling and department overreaches, many of which have been implemented—rather deceptively—in the purported interest of “public safety.”

#### i.i pleading the fourth

The beginning of the undermining of the Fourth Amendment can be traced back to the occupation of the postbellum American South, when Congress passed the Reconstruction Act of 1867, which “divided the former Confederate states into military districts and placed them under the control of the U.S. Army, various commanders, and the U.S. attorney general. The military was used as the primary source of civil law enforcement.”<sup>78</sup> This occupation was viewed by

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<sup>77</sup> Hall & Coyne, “The Militarization of U.S. Domestic Policing” in *The Independent Review* 17, no. 4, 490.

<sup>78</sup> Hall & Coyne, “The Militarization of U.S. Domestic Policing” in *The Independent Review* 17, no. 4, 491.



many residents of the American south as a violation of the Fourth Amendment<sup>79</sup>, and, after tensions had come to a boil over widespread allegations of an unfair election, legislators implemented the Posse Comitatus Act to attempt to douse the flames of resentment that were being stoked within the occupied South, which “prohibited use of the army as a posse comitatus (force of the people) except in cases where it was specifically allowed by the U.S. Constitution or ordered by Congress” and made it illegal for the U.S. military to enforce civil laws as they presently were in the Reconstruction-era South.<sup>80</sup> It “sought explicitly to constrain the federal government’s domestic use of its military power. Although the original law applied only to the army, it was later amended to include the air force, the navy, and the marine corps. The National Guard and the Coast Guard are exempt from the act so long as they remain under state government control.”<sup>81</sup> This was intended as a safeguard against the possibility of the federal government overstepping its bounds and exerting control over the states without consequence. As the occupation of the American South set a dangerous precedent for the federal government to be able to occupy other states with no external checks needed, the Posse Comitatus Act put a limit on the federal government’s ability to control and influence individual states. The initial intent appears to have been to impose limits upon militarized or reactive regulatory bodies of the state to keep them from exerting total control over the members of a smaller community, an attempt to minimize the manifestation of the coercive or aggressive nature of these types of regulatory bodies.

It would not take long for this provision intended to protect the Fourth Amendment right of the average citizen to get in the way of the designs of the federal government. The Posse

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<sup>79</sup> This is a more complicated issue than this statement implies, however—it’s doubtful many in the South were enthused to find themselves still a part of the U.S., and there is no provision in the Constitution or its amendments giving rights to those on the losing side of a civil war/insurrectionists.

<sup>80</sup> Hall & Coyne, “The Militarization of U.S. Domestic Policing” in *The Independent Review* 17, no. 4, 491.

<sup>81</sup> *Ibid.*

Comitatus Act was first suspended in WWI by “Secretary of War Newton D. Baker [...] so the military could be used to quell domestic disturbances while the National Guard was deployed abroad. From 1917 to 1921, Baker's policy of ‘direct access’ allowed state and local agencies to call on the military for assistance without the usual permissions.”<sup>82</sup> Though at first glance, this might appear to be a benefit to the less powerful state governments, it is preparing the grounds for gross overreach in the future. It marks a return to the sharing of duty between a cohesive reactive body, the United States military, and segmented domestic reactive bodies, the states’ National Guard. The next forays into undermining the Posse Comitatus Act occurred as part of the aftermath of Wounded Knee in the *U.S. v. McArthur* (1975) case. This was concluded with the ruling that “the armed forces had not violated the act because their presence had not ‘[s]ubjected citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature, either presently or prospectively.’”<sup>83</sup> Despite the appearance to some that the U.S. military had violated the Act, the Supreme Court did not see it that way, creating a loophole for occupation of state territory by federal military forces and military-police—*police* at this time denoting local law enforcement—cooperation in the future. A year earlier, in *U.S. v. Walden* (1974), there was an unsuccessful attempt to use federal military involvement that violated the Act to dismiss charges brought against the defendant, but “courts ruled that a violation of Posse Comitatus does not require evidentiary exclusion or the acquittal of a defendant because the penalties for violating the act are plainly stated in the language of the law.”<sup>84</sup> By this point, cooperation between local, state, and federal reactive regulatory bodies had been largely normalized and codified by these rulings by the Supreme Court, among other cases. This erasure of the boundaries between these bodies would permit ease of sharing technologies, a

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<sup>82</sup> Ibid.

<sup>83</sup> Hall & Coyne, “The Militarization of U.S. Domestic Policing” in *The Independent Review* 17, no. 4, 492.

<sup>84</sup> Hall & Coyne, “The Militarization of U.S. Domestic Policing” in *The Independent Review* 17, no. 4, 492.

consolidation of regulatory power, and an adaptation of their methods of dispensing discipline in their respective functions.

This process has sped up dramatically over the past forty years, kicking off with Reagan's, Bush's, and Clinton's intensifications of Nixon's War on Drugs. The Fourth Amendment once protected against search and seizures by police without warrants and/or probable cause as well, but the 1968 Supreme Court case *Terry v. Ohio* dismantled this protection; "[k]nown as the stop-and frisk rule, the Terry decision stands for the proposition that, so long as a police officer has 'reasonable articulable suspicion' that someone is engaged in criminal activity and dangerous, it is constitutionally permissible to stop, question, and frisk him or her—even in the absence of probable cause."<sup>85</sup> The wording of this decision is vague, which makes it nigh impossible to determine whether an officer had 'reasonable articulable suspicion' *at the time* if asked to give an account of their reasoning in a courtroom. Since this ruling, "it is no longer necessary for the police to have any reason to believe that people are engaged in criminal activity or actually dangerous to stop and search them. As long as you give 'consent,' the police can stop, interrogate, and search you for any reason or no reason at all."<sup>86</sup> What counts as consent is rather misleading, or at least, has become such after the resolution of a later Supreme Court case: *Florida v. Bostick*. The Court ruled the search of the bus Bostick was driving to be consensual, declaring that "Bostick's encounter with the police was purely voluntary, and therefore he was not 'seized' within the meaning of the Fourth Amendment. Even if Bostick did not feel free to leave when confronted by police at the back of the bus, the proper question, according to the Court, was whether 'a reasonable person' in Bostick's shoes would have felt free to terminate the encounter. A reasonable person, the Court concluded, would have

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<sup>85</sup> Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2020 Edition), 80.

<sup>86</sup> *Ibid.* 81.

felt free to sit there and refuse to answer the police officer's questions, and would have felt free to tell the officer 'No, you can't search my bag.'"<sup>87</sup> This is a peculiar decision, especially when one considers that "a number of lower courts had found absurd the notion that 'reasonable people' would feel empowered to refuse to answer questions when confronted by the police."<sup>88</sup> Considering the common consensus amongst average Americans that police are to be respected and feared, and that they are to be complied with under any circumstance, and also the militaristic and reactive nature of American policing, this verdict seems somewhat absurd, especially coming from a branch of government that is supposed to function as an apolitical and impartial supervisory body. Indeed, "the overwhelming majority of people who are confronted by police and asked questions respond, and when asked to be searched, they comply. This is the case even among those, like Bostick, who have every reason to resist these tactics because they actually have something to hide. This is no secret to the Supreme Court. The Court long ago acknowledged that effective use of consent searches by the police depends on the ignorance (and powerlessness) of those who are targeted."<sup>89</sup>

There is something to be said for the trend made visible here, that of cases against members of a minority being decided in ways that "justify" violations of constitutional rights. A population as diverse and striated as America's hosts subnetworks of relationships of power between cultural, ethnic, and social groups, and these can be pitted against one another either organically or through subtle manipulation by other apparatuses of power to secure more power for themselves. Through influencing these micro-relations of power, a larger power structure may be able to produce a certain kind of institution-specific knowledge to make their agendas more palatable, or to placate other groups for being especially aggressive in their disciplining of

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<sup>87</sup> Ibid. 83.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid. 84.

a specific subgroup. However, though this phenomenon is incredibly important, and certainly provides insights into one tactic through which branches or apparatuses of government may secure further control of the population at large, it is too complex an issue and too far removed from the scope of Foucault's works to be done justice here.

i.ii uninformed consent: “mission creep” and other power-grabbing tactics

Thus far, the police have only been acting as an apparatus of power and security could be expected to act. It has a vested interest in continuing to expand the scope of its activities and awareness of those upon whom it may act; this has been the direction in which policing seems to have been headed since the relegation of its positive duties to other institutions. Surveillance is just one tool it can use, admittedly a very important one, to expand its ‘sphere’ of influence. When asked about the use and efficacy of surveillance to glean information about relationships between groups and individuals, Foucault makes a poignant observation:

[W]hat I find most striking about these new technologies of power introduced since the seventeenth and eighteenth centuries is their concrete and precise character, their grasp of a multiple and differentiated reality. [...] [A] form of power comes into being that begins to exercise itself through social production and social service. It becomes a matter of obtaining productive service from individuals in their concrete lives. And, in consequence, a real and effective ‘incorporation’ of power was necessary, in the sense that power had to be able to gain access to the bodies of individuals, to their acts, attitudes, and modes of everyday behavior.<sup>90</sup>

This relatively “new” technology of surveillance was far from an accidental or serendipitous consequence of police. For police to effectively regulate both physical and digital interactions, trade, and crime, to continue to exert power over the average citizen of a state, it has

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<sup>90</sup> Foucault, “Truth and Power” in *Essential Works of Foucault, 1954-1984: Power*, 124-125.

to seize whatever means it can to perpetuate its own influence. To effectively “work within reality,” as previously mentioned, surveillance techniques are a key component of reactive regulatory forces’ ability to identify and prevent or respond to what the law (or officers or forces themselves) deem criminal activity. They need whatever technological or fiscal advantages they can accrue over the communities they oversee in order to maintain their level of power and control. The police rely just as much on their perception and reputation in the public eye and the lenience of other government agencies to hold onto the advantages and privileges they seek for themselves, however.

There are specific tactics that either the police or the federal government can employ to aid in the promulgation of this self-regulatory apparatus of state security. One of the ways that a government agency can expand its budget is through “mission creep,” which occurs when an agency “[expands] the scale and scope of their activities” with the intent “to signal to other parts of government and to the public that the agency is engaged in the provision of crucial services. Functionaries then use this expansion to justify requests for additional funding and employees.”<sup>91</sup> They are also incentivized to exhaust the financial resources allocated to them as, by doing so, “a bureau signals specifically that it needs additional resources in future periods to accomplish its increasing portfolio of ‘crucial’ activities.”<sup>92</sup> Sometimes, it happens to work out that allowing “mission creep” to blur the division between two of these agencies is to the advantage of both, and this is the case for the police and the military, as both “are organized as bureaucracies and have an inherent tendency to push to expand the range of their activities. Both look to increase steadily their spending on new and existing activities [...]. The military, looking to extend its powers, expand its budget, and increase its personnel, has an incentive to expand into and exert

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<sup>91</sup> Hall & Coyne, “The Militarization of U.S. Domestic Policing” in *The Independent Review* 17, no. 4, 488.

<sup>92</sup> *Ibid.*

influence over domestic police activities. [...] The result of this process is a blurring of the police/military distinction and the erosion of constraints on domestic police activities.”<sup>93</sup> It is noteworthy that these apparatuses of power are both security forces, and that both are *reactive* regulatory bodies. This not only makes the sharing of their functions easier, but is also a way through which they can consolidate and strengthen the disciplinary tactics they employ in overseeing and controlling foreign or domestic activities.

There is the matter of public opinion to consider when an agency plans on expanding the breadth of its dealings. In order to keep “mission creep” from becoming alarming to certain observant members of society, some tact and subtlety is needed. This has led to the practice of never letting a crisis go to waste, and, in fact, even to the creation and perpetuation of crises that did not exist in the public’s mind previously; “crises, whether they are actual or merely perceived (for example, the threat of drug gangs, terrorism, nuclear war, and so forth), provide an opportunity for government to increase in size and scope. During times of crisis, the public cries out for government to ‘do something.’ As indicated by the political economy of bureaucracy and special interest, these groups take advantage of the crisis-spawned openings to expand their operations. [...] Once the crisis has ended, the government reduces its activities, but does not return to its precrisis dimensions because some new programs, agency expansions, and spending increases persist.”<sup>94</sup> Foucault noted that apparatuses of power very often produce knowledge that has the consequence of supporting their current causes or plans, and the police are no exception to this. Police produce knowledge about *people*, and, to refer to a previously cited observation of Foucault’s, about “everything that happens” in the public sphere (and sometimes even in private ones). This refers not only to the convictions for which police forces are responsible, but arrest

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<sup>93</sup> Ibid. 488-489.

<sup>94</sup> Ibid. 489.

records, dispatch records, crime events, and sets of statistics based on the contents of these and other police databases. This knowledge, then, has the tendency to perpetuate or justify the expansion of police activity and control, particularly when removed from subjective context, as is the case with the quoting and utilization of “crime statistics.”

Exemplifying the surprising effectiveness of this approach are both the “war on drugs” and the “war on terror.” They enable this kind of bureaucratic behavior in two major ways: because they are wars that take place both at home and abroad, it allows the use of military forces on American soil to be justifiable, and there is no explicit, static end goal to be achieved by these wars—they may be waged in perpetuity, with ample explanation and excuses for their continuation—, “[t]herefore, the crises and the associated expansion in government will continue into the foreseeable future, resulting in an ongoing 'ratcheting up' of government spending and power.”<sup>95</sup> Through cunning and sophistic misdirection, the government is able to effectively use the fears of the governed—some of which are government-inflicted—to bolster their pet projects in “response”. The complicity of the media in no small part contributes to the efficacy of this approach, though a closer discussion of that relationship is best saved for later.

The War on Drugs was a very convenient way to pump funding into various police and military ventures. The United States government took advantage of this crisis to increase “FBI antidrug funding [...] from \$8 million to \$95 million [over the course of four years, 1980-1984]. Department of Defense antidrug allocations increased from \$33 million in 1981 to \$1,042 million in 1991. During that same period, DEA antidrug spending grew from \$86 to \$1,026 million, and FBI antidrug allocations grew from \$38 to \$181 million. By contrast, funding for agencies responsible for drug treatment, prevention, and education was dramatically reduced. The budget of the National Institute on Drug Abuse, for example, was reduced from \$274

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<sup>95</sup> Ibid. 489-490



million to \$57 million from 1981 to 1984, and antidrug funds allocated to the Department of Education were cut from \$14 million to \$3 million.”<sup>96</sup> Some of the funds set aside for use in the waging of this imprecisely-defined perpetual “war” were not even explicitly designated for any set function, and were used to wave away what would otherwise seem to be fascistic decisions—“[i]n September 1986, with the media frenzy at full throttle, the House passed legislation that allocated \$2 billion to the antidrug crusade, required the participation of the military in narcotics control efforts, allowed the death penalty for some drug-related crimes, and authorized the admission of some illegally obtained evidence in drug trials.”<sup>97</sup>

It also, more or less, gave police *carte blanche* to act as they see fit, provided it was in the purported interest of seizing drugs and putting away those involved with them. In *The New Jim Crow*, Michelle Alexander notes that “[t]he absence of significant constraints on the exercise of police discretion is a key feature of the drug war’s design. It has made the roundup of millions of Americans for nonviolent drug offenses relatively easy.”<sup>98</sup> She argues that the federal government has been very lenient with law enforcement and almost eager to give it more and more impunity in its dealings with U.S. citizens, and there has been an especially dramatic shift of power from the people to the state within the last forty years: “[p]olice searches of vehicles are but one example [of police overreach]. Virtually all constitutionally protected civil liberties have been undermined by the drug war. The Court has been busy in recent years approving mandatory drug testing of employees and students, upholding random searches and sweeps of public schools and students, permitting police to obtain search warrants based on an anonymous informant’s tip, expanding the government’s wiretapping authority, legitimating the use of paid, unidentified informants by police and prosecutors, approving the use of helicopter surveillance

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<sup>96</sup> Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2020 Edition), 63.

<sup>97</sup> *Ibid.* 67.

<sup>98</sup> *Ibid.* 77.

of homes without a warrant, and allowing the forfeiture of cash, homes, and other property based on unproven allegations of illegal drug activity.”<sup>99</sup> For specific examples of this favor, refer to the previously covered Supreme Court rulings on cases involving police overreach in relation to civilians’ Fourth Amendment rights, and note how these landmark cases always favor the police in their resolution.

The aftermath of the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon paved the way for the near-total evisceration of Fourth Amendment protections. It took little more than a month for Congress to draft up the USA PATRIOT Act in response to the attacks; this proposed piece of legislation “reduced restrictions on law enforcement personnel and allowed them to gather more intelligence information on U.S. civilians. It also authorized indefinite detentions and the search of private property without the owner’s consent or knowledge and expanded the ability of federal forces to search telephone, email, and financial records without a court order.”<sup>100</sup> It was sold to the public as necessary to catch and prevent terrorist activities both foreign and domestic, never mind the fact that this piece of legislation completely eviscerated the right to privacy of every law-abiding citizen in the process. The bill was passed in the Senate with only one dissenting voice—Russ Feingold, a Democratic senator from Wisconsin<sup>101</sup>—and signed into law by George W. Bush only three days later, on October 26, 2001<sup>102</sup>. This was far from the only domain ceded to state and local law enforcement; “mission creep” was enabled and even encouraged between police and the FBI as they “began to expand its Joint Terrorism Task Forces (JTTFs) for the purpose of sharing intelligence, training, and other knowledge across agencies. Coordinated through the FBI, information flows freely

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<sup>99</sup> Ibid. 79.

<sup>100</sup> Hall & Coyne, “The Militarization of U.S. Domestic Policing” in *The Independent Review* 17, no. 4, 498.

<sup>101</sup> “Roll Call Vote 107th Congress - 1st Session.” U.S. Senate: U.S. Senate Roll Call Votes 107th Congress - 1st Session.

<sup>102</sup> “H.R.3162 - 107th Congress (2001-2002): Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001.” Congress.gov.

between federal, state, and local agencies connected through the JTTFs. The original JTTF was based in New York City, but over time more than 100 such task forces expanded across the country. [...] 71 forces were added after the terrorist attacks on September 11, 2001.”<sup>103</sup>

### i.iii police privilege and its consequences

Despite the significant developments and advances made in surveillance technology, police surveillance itself remains an inefficient and even dubious technique. Police end up harassing a lot of innocent people before they find someone who is guilty of committing a crime—though it also happens that they sometimes tire of waiting for a perpetrator and may plant evidence on an innocent individual, possibly to keep up arrest rates or to bolster whatever statistics they need to generate to continue to receive the same level of funding. The innocents who have been made to fear for their lives and had their property torn through have next to no legal recourse, unless their situation is extreme<sup>104</sup>. Alexander remarks that “[t]he inevitable result is that the people who wind up in front of a judge are usually guilty of some crime. The parade of guilty people through America's courtrooms gives the false impression to the public—as well as to judges—that when the police have a ‘hunch,’ it makes sense to let them act on it.”<sup>105</sup> If that alone were not enough to call the ethicality—and efficacy—of these methods of interrogation and surveillance into question, consider that there is no “special police training” that helps the police find drug traffickers. Consider the purpose of “[the DEA-funded Operation Pipeline], administered by over three hundred state and local law enforcement agencies, [which] trains state and local law enforcement officers to use pretextual traffic stops and consent searches on a large scale for drug interdiction. Officers learn, among other things, how to use a minor traffic violation as a pretext to stop someone, how to lengthen a routine traffic stop and leverage it into

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<sup>103</sup> Hall & Coyne, “The Militarization of U.S. Domestic Policing” in *The Independent Review* 17, no. 4, 497.

<sup>104</sup> Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2020 Edition)*, 88.

<sup>105</sup> *Ibid.* 88-89.

a search for drugs, how to obtain consent from a reluctant motorist, and how to use drug sniffing dogs to obtain probable cause.”<sup>106</sup> The idea here is clearly not to protect society against “dangerous” people, but a highly inefficient attempt to regulate attitudes and exert their influence further over the social and economic sphere of relationships between Americans. Highlighting the inefficiency of this method even further, “[t]he ‘drug-courier profiles’ utilized by the DEA and other law enforcement agencies for drug sweeps on highways, as well as in airports and train stations, are notoriously unreliable. [...] Even striving to obey the law fits the profile!”<sup>107</sup> The justifications for this mass surveillance are undermined by the reality of the poor track record of these programs to catch actual criminals—and for how much hassle and grief they can cause for innocent civilians, particularly those belonging to marginalized communities.

The idealistic vision for this discipline was that it “must be equal for all, important as it is for the good of the state as for all who live well and honestly within it.”<sup>108</sup> Those living in reality are well aware that this has never been and, in spite of even the best-intentioned society’s efforts, never will be the case. Part of the problem with this dangerously optimistic outlook is made evident in the very structure of the current system of policing—that is, the fact that it is a *bureaucratic* institution. Such institutions are dependent on continual growth and reinforcing their authority relative to the other arms of government, and thus are constantly locked in power struggles with these other branches—as well as occasionally with the populace itself, though this is a rarer occurrence. From a Foucauldian perspective, because the original conceptualization of American government provided its citizens with so many freedoms, this continual process of the police amassing more power can be made a tolerable—even necessary—concession in the eyes of the general public. Of particular use in this effort is the “knowledge”—that is, the crime

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<sup>106</sup> Ibid. 89.

<sup>107</sup> Ibid. 90-91.

<sup>108</sup> Foucault, *Security, Territory, Population: Lectures at the Collège De France, 1977-1978*, 328.

statistics, arrest records, and individual profiles—that the police generate, as it can be used to justify their continued expansion into other fields and their increased access to and possession of military-grade equipment.

Indeed, there has been quite an uptick not only in police force funding but also in the quality and quantity of specialized equipment allotted to them. The United States has been subject to indirect militarization of their “peacekeeping” forces, which “occurs when domestic police forces acquire military characteristics over time. Instead of performing their standard function of enforcing laws to protect property, police begin proactively to seek criminals and to use military strategy, weaponry, and tactics (for example, no-knock raids, counterterrorism operations, and so forth).”<sup>109</sup> There are many concrete indicators of this militarization:

Domestic law enforcement has taken on the characteristics of the armed forces by engaging in military-style training, acquiring military weapons, and utilizing military tactics in everyday operations. To illustrate this militarization, consider the number of state and local law enforcement agencies that have acquired and maintained police paramilitary units (PPUs) or special weapons and tactics (SWAT) units. In 1982, 59 percent of police departments employed a PPU. By 1990, 78 percent of departments had a PPU, and by 1995, the portion had grown to 89 percent (Kraska and Kappeler 1997, 6). Police departments of all sizes around the country have obtained and maintained hundreds of millions of dollars’ worth of military equipment, ranging from M-16 assault rifles, riot gear, and body armor to tanks, grenade launchers, and armored vehicles. Further, the use of wire tapping, the examination of financial and other personal records

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<sup>109</sup> Hall & Coyne, “The Militarization of U.S. Domestic Policing” in *The Independent Review* 17, no. 4, 487.

without judicial clearance, and other violations of personal liberties that were once unimaginable are no longer uncommon practices among domestic police.<sup>110</sup>

These new and often expensive privileges enable the police to expand the scope of and to hone their methods of disciplining the public, though one would not be remiss to question why such overpowered equipment is being given to them with the permission to use it more or less as they see fit, and not solely to be used in the service of a specific function or cause. This is easily answered by considering to whom it is the police are beholden; at least in the present day, they can only be held accountable by the courts, and the only bodies that can influence or direct their funding other than the departments themselves are federal and state government agencies. Though the police command some power, they are, in turns, held in check by or supported by their relations of power with other institutions and agencies. To better understand how these relationships influence the duties and privileges of police forces, as well as their public reputation and even the facilitation of the bending of law in their favor, one must divide this issue into specific organizational reciprocities and consider their exchange of favors in the proper context.

#### *ii. Bureaucratic and Institutional Reciprocity*

The Reagan administration financially incentivized police to engage in the drug war by giving “state and local law enforcement agencies [...] the authority to keep, for their own use, the vast majority of cash and assets they seized when waging the drug war.”<sup>111</sup> So long as the drug war continued to be waged, police forces would be allowed to benefit from a new and unethical source of revenue. They could “[increase] the size of their budgets, quite substantially, simply by taking the cash, cars, and homes of people suspected of drug use or sales. At the time

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<sup>110</sup> Hall & Coyne, “The Militarization of U.S. Domestic Policing” in *The Independent Review* 17, no. 4, 486.

<sup>111</sup> Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2020 Edition)*, 98-99.

the new rules were adopted, the law governing civil forfeiture was so heavily weighted in favor of the government that fully 80 percent of forfeitures went uncontested. Property or cash could be seized based on mere suspicion of illegal drug activity, and the seizure could occur without notice or hearing upon an *ex parte* showing of mere probable cause to believe that the property had somehow been ‘involved’ in a crime.”<sup>112</sup> In this dubious practice of asset forfeiture, police have been given so much leniency in this regard they sometimes forego all legal pretense. The bar for proving an item’s involvement in a crime is incredibly low, to the point where it hardly matters if its owner is indisputably innocent of any wrongdoing—“[p]rior to the Reform Act, the Supreme Court had ruled that the guilt or innocence of the property’s owner was irrelevant to the property’s guilt—a ruling based on the archaic legal fiction that a piece of property could be ‘guilty’ of a crime. [...] [T]he government’s burden of proof is so low—the government need only establish by a ‘preponderance of the evidence’ that the property was involved in the commission of a drug crime.”<sup>113</sup> Despite the Reform Act’s attempt to prevent unconstitutional seizures of private property, its wording makes it a relatively toothless piece of legislation. This has been a very profitable side-venture for police, as, “according to a report commissioned by the Department of Justice, between 1998 and 1992 alone, Byrne-funded task forces seized over \$1 billion in assets. Remarkably, this figure does not include drug task forces funded by the DEA or other federal agencies.”<sup>114</sup>

Even without considering the mutual “mission creep” between state and local law enforcement and the U.S. military, there are many mutually beneficial relationships the police have with other private and bureaucratic institutions that have influenced our laws and social norms. One of the most insidious relationships is between law enforcement and prison-guard

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<sup>112</sup> *Ibid.* 99.

<sup>113</sup> *Ibid.* 103.

<sup>114</sup> *Ibid.* 100.

unions and private prisons. Both the police and prison-guard unions have a common interest in perpetuating the drug war to keep up their increased funding, as, “[o]ne program, Community Oriented Policing Services, allocated more than \$10 billion to more than 12,000 agencies in less than a decade (Eisler and Johnson 2005). The availability of these funds and the lure of further windfall profits prompted these groups to push for expanded drug laws and additional drug-interdiction activities. A relaxation of drug laws would mean smaller budgets for police and prison-guard unions.”<sup>115</sup> The interest of private prisons in the continuation of the War on Drugs is more widely understood—“[i]ncome for these firms depends directly on the number of incarcerated individuals. The increased penalties for drug crimes advocated by police unions have made private prisons a particularly lucrative business.”<sup>116</sup> Many other industries in the private sector exert their influence over our legislation through lobbyist payouts, one of these being “[t]he drone lobby[, which] includes the manufacturers of drones as well as those who provide support services—training, maintenance, and consulting services—for the aircraft. [...] [T]he Association for Unmanned Vehicle Systems International more than doubled its lobbying budget in 2011 in support of House Resolution 658,” or the “Federal Aviation Administration Air Transportation Modernization and Safety Improvement Act,” which “authorizes *domestic* use of aerial spy drones by the U.S. government.”<sup>117</sup> This legislation was adopted in 2012.<sup>118</sup>

#### ii.i complicity of the media: state propaganda

When discussing the theory of policing proposed during the Enlightenment, Foucault emphasizes “[p]olice is not justice. Whether written by those who support and justify the need for a police, or by jurists or parliamentarians who display a certain mistrust of police, all the texts

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<sup>115</sup> Hall & Coyne, “The Militarization of U.S. Domestic Policing” in *The Independent Review* 17, no. 4, 496.

<sup>116</sup> *Ibid.*

<sup>117</sup> Hall & Coyne, “The Militarization of U.S. Domestic Policing” in *The Independent Review* 17, no. 4, 499.

<sup>118</sup> *Ibid.*



agree on this: police is seen as not being justice. Of course, like justice it derives from royal power, but it remains clearly separated from justice.”<sup>119</sup> That view has been buried over time, both in the United States court system and in the public’s perception.

From whence did all this public support for these initiatives and restrictions of individual freedoms originate?<sup>120</sup> The government poured significant sums of money into community outreach programs such as DARE to promote a positive image of their “War on Drugs,” and it paid off: “in 1989, 70 percent [of polled Americans] favored using military assistance (equipment and supplies) abroad to fight drug trafficking, and 69 percent favored using military advisors to support foreign troops in their efforts to combat drugs.”<sup>121</sup> In the case of the terrorist attacks on 9/11, very little positive spin was needed to make the government’s response palatable, as, unlike the “War on Drugs”, the “War on Terror” had a very definite—and for many, traumatic—beginning. The September 11 attacks presented the government with a golden opportunity for overreach, as the climate of fear and insecurity amongst the public inclined them to take a more positive view of government surveillance and militarization of domestic law enforcement: at this time, “63 percent of Americans thought it would be necessary for the average person to give up some civil liberties to curb terrorism” and “86 percent of Americans approved of the use of facial-recognition software by authorities at public events. In addition, 63 percent favored extending the use of cameras and other surveillance technologies, and 54 percent approved of increased monitoring of private cell phones, emails, and Internet usage.”<sup>122</sup> Hall and

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<sup>119</sup> Foucault, *Security, Territory, Population: Lectures at the Collège De France, 1977-1978*, 339.

<sup>120</sup> Though it falls somewhat outside the focus of this paper, it is worth mentioning Hollywood’s role in influencing public opinion on law enforcement by creating positive or flattering archetypes for law enforcement in media. The “cop” genre is a staple of the American movie and television show business, and has been around for decades. These portrayals are worth studying for the values they emphasize and what myths about policing they may help perpetuate.

<sup>121</sup> Hall & Coyne, “The Militarization of U.S. Domestic Policing” in *The Independent Review* 17, no. 4, 494.

<sup>122</sup> *Ibid.* 498.

Coyne further note the shift in Americans' attitudes, particularly highlighting an increase of their trust in the United States government:

On September 7, 2001, a Gallup poll had found that only 14 percent of Americans trusted the government a 'great deal' with regard to its ability to handle foreign problems, and only 6 percent trusted the government's capabilities in regard to handling domestic troubles. By October 2001, however, 36 percent of Americans reported a 'great deal' of trust in the government on foreign issues, and 24 percent 'highly trusted' the government on domestic issues. A total of 83 percent felt a 'great deal' or 'fair amount' of trust on foreign issues. Finally, 77 percent expressed confidence in the government's ability to handle domestic concerns.<sup>123</sup>

There are also many cases where the media has been more complicit than airing government-funded advertising or making clever use of tragedies to conveniently back up a desired government program or flattering narrative. Sometimes, as was the case in the "Jaubert Affair," the press chooses to take law enforcement at their word on specific cases against individuals and report on their account as if it was indisputable fact to sway the "court of public opinion". This incident involved French journalist Alain Jaubert, following his request to some police officers to accompany an injured member of the Antillaise (revolutionary movement?) to the hospital, on account of his occupation. Though they were five minutes from a hospital, it took thirty minutes for the police to take the injured revolutionary to it, and fifty-five minutes later, Jaubert re-emerges, bloodied and in destroyed clothing. He is accused the following evening of assaulting the agents and trying to escape from the moving van, and was placed under arrest for rebellion, assault and contempt of law enforcement officers. This information did not add up to many journalists and activists, and Foucault, among others, rallied in defense of

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<sup>123</sup> Ibid.

Jaubert.<sup>124</sup> Foucault accuses the press of this behavior and admonishes them for running conflicting narratives, some of which depart partially or completely from the facts of the incident.<sup>125</sup> In a case involving the fate of an activist journalist, Foucault decries bad journalism, remarking that “[t]he Jaubert case is certainly a roughed-up sort, but it [demonstrates] an unhealthy, dangerous relationship between the police and the press, too: a relationship made from lies, pressure, insinuations and maneuvers. The relationship between the police and the law is dangerous as well: interdependence, various reciprocities, a game of referrals and sleuths. Finally, there is the unhealthy and dangerous relationship between the judicial apparatus and the police: intimidation, pressure, fear.”<sup>126</sup>

#### ii.ii complicity of the courts

The judiciary system has played no small part in enabling the militarization of police and incentivizing their miscarriages of duty as well. Regarding this particular societal issue, Foucault warns that, “[f]or a justice system to be unjust, it doesn’t need to convict the wrong individual; it only needs to judge in the wrong way.”<sup>127</sup> Serving as evidence of such occurrences are the previously cited Supreme Court rulings that favored protecting the actions of police over the security and rights of the “rabble,” where blatantly unconstitutional decisions were made to bolster the authority of law enforcement. Oftentimes courts play as accomplices to officers who use excessive force in apprehending suspects, in addition to protecting those who overstep the law in regard to search and seizure or in “obtaining consent” from a suspect. There has also been a trend in many recent trials involving excessive force in apprehending suspects where the law enforcement official(s) in question are either completely exonerated based on tenuous defenses

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<sup>124</sup> Foucault, « l’article 15 » in *Dits et Écrits, I: 1954 – 1975*, 1066.

<sup>125</sup> Foucault, « l’affaire Jaubert » in *Dits et Écrits, I: 1954 – 1975*, 1068.

<sup>126</sup> *Ibid.* 1069.

<sup>127</sup> Foucault, “The Proper Use of Criminals” in *Essential Works of Foucault, 1954-1984: Power*, 429.

(reasonable suspicion, for one), specially selected or “fragmented” bodycam footage (see the Rodney King case’s proceedings and decision<sup>128</sup>), or any number of other convenient excuses. Though some judges—mostly local and even some state—have fought admirably to protect the rights of individuals, many of those belonging to federal courts and the Supreme Court have shown a willingness to bend or ignore rulings that they or their predecessors had established previously, all in the name of “public safety.”

On the subject of complicit judges, Foucault’s involvement in the aforementioned “Jaubert Affair” extends beyond his critique of the story’s handling by the media—he also expressed disagreement with the way the court intended to handle the case. His distrust led him to go so far as to declare a counter-inquest to the official investigation, to ensure the police will be held accountable by *someone* for their misuse of power. He bases this demand for the creation of a counter-investigation force and justifies his complaints about the handling of the Jaubert incident on a violation of Article 15 of the *Declaration of the Rights of Man* (1789), insisting that “[s]ociety has the right to hold all public administrators accountable.”<sup>129</sup> Foucault emphasizes that the commission he helped to organize and served as a part of is not trying to do the justice system’s job for them, or attempting to co-opt their function; rather, they aim to take stock of the dangers the system poses to the people, and to speak out about it and provide methods of defense against its abuses.<sup>130</sup> His desire to be a part of this effort is amplified by what he discovers when questioning witnesses about the Jaubert case—mainly, that many of them expressed fear of the police, and wished to remain anonymous in their testimony that contradicted the police’s narrative.<sup>131</sup> He warns that, “[w]hen people are afraid of their police, when one no longer dares to

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<sup>128</sup> Crenshaw, Kimberle & Peller, Gary. “Reel Time/Real Justice”. *Denver University Law Review*, Vol. 70.

<sup>129</sup> Foucault, « L'article 15 » in *Dits et Écrits, I : 1954 – 1975*, 1067.

<sup>130</sup> Foucault, « l’affaire Jaubert » in *Dits et Écrits, I : 1954 – 1975*, 1067-1068.

<sup>131</sup> *Ibid.* 1070.

seek recourse in one's judiciary system because one knows it is too dependent on the police, when at last the press and public opinion, one's last appeal, are at risk of being poisoned, maneuvered by the police, then the situation is grim".<sup>132</sup> In fact, Foucault's concern turns out to have been warranted, as he notes that, by the time he and his allies on this commission found enough witnesses to establish the exact timeline of the incident, from the beginning to the end of Jaubert's run-in with the police, within two days, Jaubert was convicted of his alleged crimes by a judge, based on no evidence other than that given by the police, whom the court had to pay for their testimony.<sup>133</sup> This was an intentional move; Foucault explains that, "[b]y charging Jaubert with assault and contempt of law enforcement, the examining magistrate covered up the extreme violence of the police. We can no longer hope that, in these same hands, such examinations will be carried out correctly."<sup>134</sup>

The fault seldom falls solely upon judges when a case is poorly handled, however. Foucault wrote about a court verdict he vehemently disagreed with that involved the execution of a man, Ranucci, after he was convicted of the murder of a little girl on dubious grounds—it was still unclear whether he had committed the crime.<sup>135</sup> Foucault explains the elements of the crime that do not match up with the reality of Ranucci's situation; though there were some unusual and suspicious things noted about his appearance when he was apprehended, his car and he himself were not recognized by any eyewitnesses to the crime. However, all it takes is "[e]ven hours of interrogation, and he confesses. He confesses again twice in the following moments."<sup>136</sup> Not only were the facts of the case not adding up, "certain details of the confession were not correct; and that on many, seemingly false points, Ranucci had told the truth."<sup>137</sup> Instead of this exonerating

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<sup>132</sup> Ibid. 1069.

<sup>133</sup> Ibid. 1070.

<sup>134</sup> Foucault, « L'article 15 » in *Dits et Écrits, I : 1954 – 1975*, 1066.

<sup>135</sup> Foucault, "The Proper Use of Criminals" in *Essential Works of Foucault, 1954-1984: Power*, 429.

<sup>136</sup> Ibid. 430.

<sup>137</sup> Ibid. 431.

Ranucci, the facts of the case shifted to fit his confession.<sup>138</sup> Foucault refuses to hold solely the police accountable for this outcome, as, “if the justice system, from top to bottom, were not such a consumer of confessions, the police would be less apt to produce them, and by every means.”<sup>139</sup> He asks of the process: “you wonder what went wrong with that machine that should have halted at every moment, or, rather, what kept it going: the bias of the police, a judge's hostility, the sensationalism of the press? Yes, those things were a factor, but at bottom, and holding it all ‘on track,’ there was something simple and monstrous—laziness. The laziness of the investigators, the judges, the lawyers, of the whole legal apparatus. A justice system is ludicrous when it is so indolent that it doesn’t manage to deliver a verdict. But one that deals out a death sentence with an almost sleepy gesture...”<sup>140</sup> The public does not escape his criticism in this process, as their disposition toward the accused can, in fact, have some influence over the verdict of a case, and many make up their minds about the accused based on the crime and the person’s background before a proper trial even begins.<sup>141</sup>

These apparatuses of power have become abusive in their ministrations to society, both at the individual level and at large. They continue to spread their influence, covertly or overtly, into new domains, and serve to reinforce the authority of other institutions that might otherwise see them as rivals for government funding. As Foucault gravely notes in his call to action in « L’article 15 », “[the Jaubert] case is far from isolated. Incidents of this kind have multiplied for months: all give evidence of a system where magistrates and police give each other a hand. This system is a threat to all of us, and we must defend ourselves relentlessly against it.”<sup>142</sup> Though it is not the primary or even major focus of any of his body of works, Foucault’s understanding of

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<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid. 429.

<sup>141</sup> Ibid. 433.

<sup>142</sup> Foucault, « L’article 15 » in *Dits et Écrits*, I : 1954 – 1975, 1066.

society, power relations, and the aims of the state can provide us with the knowledge and framework for doing just that.

#### IV. The (F)utility of Reform

It is perfectly reasonable to wonder, after beginning to learn the extent and pervasiveness of police overreach, its authoritarian character, and the complicity of many other government and private institutions, what, if anything, one is able to *do* about it. After all, on the individual level, there really is not much that can effectively be done—change must be brought about through collective action, but this has its risks; one might merely be aiding one oppressive regime in overthrowing another or replacing one abusive institution with a superficially different copy. It is difficult to be able to tell whether a large social movement will bring about the changes one wants to see in an institution or in the state itself, or even if it will result in its own purported aims. With the track record many revolutions have, exchanging one despot or malignant institution for another, it is understandable that an individual may feel cynical and wary of any attempts to shift the status quo, no matter their concerns about its trajectory or how unpleasant they may find it.

As tenuous as one's position is in regard to effecting positive social changes and redirecting power, Foucault does not believe that one should not try to change one's situation when one sees it as intolerable. In *Useless to Revolt?*, Foucault addresses the titular query with a warning not to take every 'revolutionary' or reformer at their word, but also urges us not to write off the possibility of achieving positive changes in society entirely:

No one has the right to say, 'Revolt for me; the final liberation of all men depends on it.'

But I am not in agreement with anyone who would say, 'it is useless for you to revolt; it is always going to be the same thing.' One does not dictate to those who risk their lives facing a power. [...] A convict risks his life to protest unjust punishments; a madman can



no longer bear being confined and humiliated; a people refuses the regime that oppresses it. That doesn't make the first innocent, doesn't cure the second, and doesn't ensure for the third the tomorrow it is promised. [...] All the disenchantments of history won't alter the fact of the matter: it is because there are such voices that the time of human beings does not have the form of evolution but that of 'history,' precisely.<sup>143</sup>

One cannot do away with power; it can only change hands and methods of control. This is also not necessarily a worrying thing—power, when used to the benefit of more than just the state, when it prioritizes citizen happiness and freedoms while giving *some* concern for safety, does not have to be unbearably oppressive. Those who claim that there is a movement in American society to “abolish” policing pretend that these groups wish to replace it with nothing, when that is far from true; one only has to ask a member of these activist groups to learn that they are actually reformers, advocating for a different allocation and distribution of power than that which currently exists. It is ludicrous to think one could abolish this apparatus of power, but significantly less so to consider the ways in which it might be changed to serve its role less invasively or brutally. Foucault suggests that this is something to keep in mind, that “the power that one man exerts over another is always perilous. I am not saying that power, by nature, is evil; I am saying that power, with its mechanisms, is infinite (which does not mean that it is omnipotent [...]). The rules that exist to limit it can never be stringent enough; the universal principles for dispossessing it of all the occasions it seizes are never sufficiently rigorous. Against power one must always set inviolable laws and unrestricted rights.”<sup>144</sup>

As our rights are continuing to be infringed upon, inaction is no longer a viable position to any self-respecting person aware of this trend, save for those who are uncertain of how they

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<sup>143</sup> Foucault, “Useless to Revolt?” in *Essential Works of Foucault, 1954-1984: Power*, 452.

<sup>144</sup> *Ibid.* 452-453.

can combat this. Though there is risk inherent in taking a stand against any apparatus of power, even if that opposition is nonviolent, rational, and social opinion favors it, there are some methods more effective and less likely to end in tragedy than defying significant apparatuses of power head-on. Foucault also encourages those who wish to bring about meaningful change to think *beyond* the state:

To pose the problem in terms of the state means to continue posing it in terms of sovereign and sovereignty, that is to say, in terms of law. [...] I don't want to say that the state isn't important; what I want to say is that relations of power, and hence the analysis that must be made of them, necessarily extend beyond the limits of the state—in two senses. First of all, because the state, for all the omnipotence of apparatuses, is far from being able to occupy the whole field of actual power relations; and, further, because the state can only operate on the basis of other, already-existing power relations. The state is superstructural in relation to a whole series of power networks that invest the body, sexuality, the family, kinship, knowledge, technology, and so forth. True, these networks stand in a conditioning-conditioned relationship to a kind of 'metapower' structured essentially around a certain number of great prohibition functions; but this metapower with its prohibitions can only take hold and secure its footing where it is rooted in a whole series of multiple and indefinite power relations that us supply the necessary basis for the great negative forms of power.<sup>145</sup>

Whether one is aware of it or not, the state is dependent not only on its apparatuses of power, external and internal, but also on social and economic relationships within the governed body, between groups and individuals. Thus, it can be affected by changes in these relationships of power—communities, when organized and relatively uniform in intent, can have more of an

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<sup>145</sup> Foucault, "Truth and Power" in *Essential Works of Foucault, 1954-1984: Power*, 122-123.

impact than people tend to realize. Community organizing is an effective way to shift the power dynamic between the governed and the state, albeit on a “micro”-level. Furthermore, working towards change does not have to be done overtly; “there are many different kinds of revolution, roughly speaking, as many kinds as there are possible subversive recodifications of power relations.”<sup>146</sup> The most effective methods of achieving desired social change or shifts in relations of power are often indirect and subtle. It is perfectly acceptable, commendable, even, to decide to try and tackle the issues one wishes to resolve from the inside of an apparatus of the state or the community one deems to be malfunctioning or using its power harmfully.

Making the decision to move from bystander to player in the struggle for societal control can be daunting—until one realizes that, willingly or not, they have always been a part of the game. What is different now is that one is taking an active role; one is declaring: “I can no longer remain impartial in this struggle, I refuse to delude myself into thinking the privation of others’ rights is neither my concern nor will affect me.” Though successful revolution or social change rarely occurs from sudden upheaval, it is far from impossible that one should succeed in enacting some level of reform in one’s state or an apparatus of state power if they are reserved and deliberate in their strategy, especially if they are able to connect and collaborate with others to reinforce common goals. Foucault’s exposure of the mystified inner workings of relations of power and the subjectivity of truth serves as a basis for further specified inquiries into the nature of other apparatuses of power—as, indeed, it served for this overview of the influence and privileges of the United States’ police—, but also can point motivated community advocates and activists toward productive modes of rebellion. The nature of power and how it is expressed is incapable of truly changing, but the intended effects, as well as checks and balances implemented by opposing apparatuses of power can, and in many cases, *should*.

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<sup>146</sup> Ibid. 123.

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